Martin Brower Company *and* John V. Sexton. Case 12-CA-10720

18 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 29 December 1983 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin Brower Company, Kissimmee, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II,B, par. 7, of his decision, the judge inadvertently referred to Tom Hale as Tom Hall. We correct the error.

In sec. II,B, par. 9, the judge found that John Sexton had never received any disciplinary warnings during his 7-1/2 years of employment with the Respondent. Sexton received no *written* warnings during that time, but he had been "spoken to" by his supervisors regarding three previous incidents in 1983 involving an altercation with another employee, raising his voice to the warehouse supervisor, and throwing down a roller. These incidents, however, did not play a role in Sexton's discharge, as Transportation Manager Roy Lay testified he based that decision solely on the 3 May 1983 incident.

In fn. 21, the judge stated that, before Lay became transportation manager, the Respondent discharged an employee for insubordination to customers and supervisors, for driving at excessive speeds, and for tampering with his truck's tachograph. Although Lay testified that he personally did not terminate that employee, there is no evidence that the employee was discharged before Lay became transportation manager.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This matter was heard by me on September 26, 1983,[1] at Orlando, Florida. The charge was filed by John V. Sexton, an individual (Sexton) on May 11. A complaint and notice of hearing was issued by the Regional Director for Region 12 of the National Labor Relations Board (Board) on June 29. The complaint alleges that Martin Brower Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act), by discharging its employee Sexton on or about May 4, because he concertedly complained to Respondent regarding a proposed change in Respondent's bidding procedures. Respondent filed an answer to the complaint on July 14, in which it denied the commission of any unfair labor practices.

The General Counsel and Respondent were represented at the hearing by counsel and all parties were provided with the opportunity to present evidence, make argument, and file briefs.

Upon the entire record in this case, including my observation of the demeanor of the witnesses who testified herein, and after due consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business located in Kissimmee, Florida, where it is engaged in the wholesale distribution of food and other food related products to various fast food restaurants doing business throughout the State of Florida. During the 12 months immediately preceding issuance of the complaint, which is a period representative of all times material herein, Respondent purchased and received at its Kissimmee, Florida facility goods and products valued in excess of $50,000 which goods and products were shipped directly to it from points located outside the State of Florida.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The primary issue in this case is whether Sexton was fired by Respondent on or about May 4 in violation of Section 8(a)(1) of the Act, because he had engaged in protected concerted activity with other employees by complaining about a proposed change in Respondent's bidding procedures.

B. *Facts*

Respondent, in the operation of its business at Kissimmee, Florida, employs approximately 52 truckdrivers who deliver food and food related products to various fast food businesses throughout the State of Florida.[2] One of Respondent's 52 drivers was Sexton. The drivers, including Sexton, bid for their driving assignments approximately every 13 weeks. For an extended period of

[1] All dates herein are 1983 unless otherwise indicated.

[2] One of the major customers of Respondent is McDonald's fast food restaurants.

time prior to the events giving rise to the instant case, the employees had bid for their assigned routes by seniority from a daily selection, that is, each driver, based on his seniority, chose whatever routes he wanted to drive on any particular day from the entire list of routes and days to be driven. Each driver with less seniority had only those routes and days to choose from that the more senior drivers did not select. This manner of bidding sometimes resulted in certain routes on certain days not being chosen by any driver.[3]

The drivers from time to time had driver-related concerns involving, among other matters, the manner in which their trucks were loaded, how the warehouse personnel performed their jobs, safety matters, and concerns involving bidding on job assignments. As a result of these concerns, Distribution Center Manager Euell Stallings established a five-member employee drivers' committee.[4] The committee was formed sometime after the first of 1983. The drivers chose from among themselves five to serve on the committee. One of the five drivers selected to serve on the committee was Sexton.[5] Driver Blunt was chosen as chairman of the committee. Blunt credibly testified he was told that a purpose of the committee was to discuss working conditions or drivers' complaints regarding bid assignments. Distribution Center Manager Stallings testified that the drivers' committee was created to "establish better loading diagrams, to deal with some of the problems we were having between the warehousemen and drivers, and to establish better safety practices."

The drivers' committee as originally established was to meet with management at least once per month; however, the committee, or certain of its members, met with management representatives at various times material to the instant case.[6] The first meeting between representatives of Respondent and the committee apparently took place the first week in March.[7] At the first meeting that Transportation Manager Lay was present, he acted as spokesperson for Respondent, and Blunt and Sexton acted as spokespersons for the drivers' committee.[8] The subject matter of bidding was discussed at this meeting. There had been no bidding for driving assignments for some months prior to this meeting. Respondent proposed at this meeting a method whereby it would select driving assignments for a week's work and place those assignments into packages and the drivers would then bid on packages of assignments instead of each driver by seniority selecting his own week's assignments from all the routes and days to be assigned.[9] Sexton testified that fellow employees had told him they did not want to bid on a package basis because in bidding by routes instead of packages the drivers were able to choose the days they wanted to work or be off, whereas in package bidding their options with respect to when they would work was much more limited. Sexton credibly testified the committee informed Lay they did not want to bid by packages of assignments. Lay testified he agreed that they would bid the assignments as they had done in the past with the stipulation that, if the bids did not work out, Respondent would have to make some adjustments at the end of the bidding, or they would have to make bid packages and start all over again.

Bidding took place in mid-April following the past procedure of bidding by routes chosen by the drivers based on seniority rather than by package bidding. According to Sexton, whose testimony on this point I credit, there were six or seven bids left over that no one selected. Sexton testified that management took it on themselves to place the unselected bids into the routes chosen by the drivers where they thought they would fit and they did so commencing with driver Mike Shutters on the seniority list.[10] Sexton testified that the unselected routes were added to the drivers' assignments without their being asked about the assignments or without going by seniority.[11] Sexton credibly testified that employee Shutters complained to him about the assignments and did so because Sexton was a member of the drivers' committee. Sexton spoke to dispatcher Douglas E. Deel about it, and Deel told him Transportation Manager Lay had instructed him to add the extra routes in without regard to seniority. Sexton spoke the next day (mid-April) with Lay who told him he would check into the matter. Sexton spoke with drivers' committee chairman Blunt and the two of them had a meeting with Distribution Center Manager Stallings.[12]

In the meeting, Sexton and Blunt told Stallings that Respondent was disregarding seniority in the bidding process, and that the drivers felt they were not being treated justly. Stallings was told that some of the new drivers were not pleased with the extra runs they were being assigned. Sexton testified without contradiction, and I credit his testimony, that Stallings stated he was unaware that Transportation Manager Lay was operating in that manner. Both Blunt and Sexton stated that Distri-

[3] There was an extra board maintained by Respondent for drivers where a driver could sign up for whatever routes or days were for whatever reason not chosen or assigned to any other driver.

[4] Transportation Manager Roy Lay testified without contradiction, and I credit his testimony on this matter, that it was Stallings who conceived the idea for a drivers' committee.

[5] None of those testifying about the formation of the committee was certain as to when its members were selected. Lay placed the date of the selection of the committee as February 20. Sexton and fellow driver Donald L. Moenning placed the date of the selection as being in March. Driver Milton Robert Blunt placed the selection as being after the first of the year, and driver James Carl Alderman stated the selection took place in January. Blunt and Alderman were members of the drivers' committee.

[6] The record is not clear and I find it unnecessary to determine precisely how many formal and informal meetings took place between the committee or parts of the committee and management. Neither do I deem it necessary to determine precisely what was discussed at any particular meeting other than to note that both Transportation Manager Lay and Sexton agree that bidding was discussed at the first meeting attended by Lay. I likewise find it unnecessary to determine who attended each meeting or to resolve any apparent or perceived conflict as to what was discussed at any particular meeting beyond what I have noted above.

[7] Both Sexton and Lay testified that the first meeting that Lay was involved in took place during the first week of March.

[8] I credit Sexton's testimony that he and Blunt acted as spokespersons for the committee.

[9] Lay testified with respect to this first meeting, "We purposedly gathered . . . to set the routes up in a week's bid."

[10] Shutters was number 26 on the seniority list according to Sexton.

[11] Sexton stated that, in the past, Respondent had always asked the drivers to take up the slack of the unselected routes.

[12] Stallings placed the meeting with Sexton and Blunt as having taken place in the latter part of April. Chairman Blunt stated the meeting took place approximately 2 weeks before Sexton was fired on May 4.

bution Center Manager Stallings called dispatcher Dave Poplan and told him not to implement the bids at that time. Stallings testified that Blunt and Sexton did not discuss their own assignments with him at the meeting, but rather discussed the impact of the bidding on other drivers at Respondent. Stallings stated it was his decision at the meeting to place the bids on hold. Stallings testified:

> After talking to [Blunt and Sexton] for approximately 15 or 20 minutes, I call[ed] Dave Poplan, or went in to see Dave, I'm not sure which. He was the dispatcher on duty. I told him to put a hold on those bids. We would not implement them the next week, as we had intended to do. We were going to wait until I got that resolved, because I didn't need a group of disgruntled employees going and calling on customers.

Stallings stated he did not give Sexton any specific instructions on his bidding because the meeting pertained to "the junior men or middle, seniority man being forced to work an unfair schedule." Sexton testified, and I credit his testimony, that Stallings told him at the meeting that they would take the extra routes and allow the drivers, by seniority from Mike Shutters (number 26 on the list) on down, to bid on the routes by picking on a day-to-day basis the ones the drivers wanted to have assigned to them. I credit Sexton's testimony as outlined above, and I do so not only because of his superior demeanor, but because it was at least in part the problem brought up by employee Shutters that caused Blunt and Sexton to meet with Stallings. Therefore, it is very probable that Shutters' situation was specifically discussed. Also, Stallings readily acknowledged that the two members of the drivers' committee came to him to discuss the problems of fellow drivers and not their own. Specifically, Stallings stated they were there to discuss the junior men or the middle seniority man being forced to work an unfair schedule.[13]

Approximately a week after Sexton's and Blunt's meeting with Distribution Center Manager Stallings, or approximately 1 week before Sexton was terminated, Blunt and others had a meeting with Transportation Manager Lay. Blunt testified the meeting with Lay was to discuss the bid situation and to see if they had gotten the matter worked out. Blunt credibly testified that Lay told him they were going to rebid the routes as they were in the packages that had been put together by the drivers, and each driver would have the option of either taking a package or not. Blunt testified he already had "some feelers out" and "most of the drivers were pretty well pleased with the way it [the bidding] was going to go . . . they had a choice." Blunt told Lay that it seemed to be okay. Sexton did not attend the meeting that Blunt testified about. Blunt testified that, as far as he knew, Sexton did not know what was discussed at that meeting.[14]

Sexton reported to work on May 3, and at approximately 5 p.m. on that date, spoke with fellow driver Gerard Frank Martin in the breakroom. Martin was selecting his bid package at the time. Sexton asked Martin what he was doing, and when Martin told him he was picking his bid package, Sexton told him they were not to do it in that way, that there had been a meeting with Distribution Center Manager Stallings and the bids were not supposed to be done the way he was doing them. Martin asked Sexton to accompany him to see Transportation Manager Lay so that Sexton could explain to Lay the situation and get it straightened out. Sexton and Martin left the breakroom area and proceeded to the dispatcher's office where the two of them spoke with Lay.[15] Those present at, in, or near the dispatch room during the May 3 meeting were Transportation Manager Lay, dispatchers Douglas Deel and Dave Poplan, Sexton, Martin, and drivers Moenning and Tom Hall.[16] Martin told Lay that he and Sexton wanted to talk with him because there was a problem with the bids. Sexton told Lay the bids were not to be done the way they were being done because he had had a meeting with Distribution Center Manager Stallings, and Stallings had said they would not be done that way. Lay told Sexton that Stallings was not there at that time and the routes had to be set up the way they were, and that was the way it was going to be done. It was Martin's turn to bid.[17] Sexton told Lay that, when it came his time to bid, he was not going to do so until they got the matter straightened out with Stallings. Lay told Sexton that Stallings was not at the facility at the time and that he (Lay) was in charge, and when it came Sexton's time to bid, he would have to bid or he would be out of a job. Sexton stated in a loud, angry, and annoyed voice[18] that he wanted Lay to state again what he had just told him so the others could witness it. Lay again repeated what he had said to Sexton. Lay turned and left the dispatch office at that time.[19]

Sexton reported for work on May 4, and was called into Lay's office where he was told he was being discharged for insubordination. I credit Sexton's testimony that he told Lay he had not attempted to be insubordi-

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[13] I noted that Shutters was the middle man seniority wise.

[14] Blunt did, however, testify that he talked with Sexton after the meeting Blunt had with Lay, but prior to Sexton's discharge, and he stated he would "imagine" they discussed the bid situation. Driver committee member James Alderman reported to Blunt that he had discussed the bid situation with three or four drivers and they also felt it was okay.

[15] The dispatcher's office is approximately 12 by 8 feet in size.

[16] There were minor differences in the testimony of those who testified about the May 3 meeting with respect to whether Lay was actually in the office or whether he stood in the doorway; and there were minor differences as to what was said by whom. I have set forth what I find to have been said. My findings are based on a composite of the testimony of Lay, Sexton, Martin, and Deel.

[17] Martin was No. 5 and Sexton was No. 12 on the seniority list.

[18] I am persuaded that Sexton spoke in a loud voice because on cross-examination he acknowledged that he did. Sexton also acknowledged he was annoyed because of the way Respondent was treating its drivers. Dispatcher Deel described Sexton as being loud and driver Martin stated Sexton spoke in an annoyed, angry, sharp manner. Lay also stated that Sexton spoke in a loud, angry manner.

[19] I find that Lay did not raise his voice at the meeting. Lay's demeanor on the witness stand impressed me that he was an individual not given to losing his temper. Sexton acknowledged that Lay over the years pretty much kept his voice on an even keel and was not known for shouting. Martin, likewise, testified that Lay usually operated on an even keel and did not lose his temper.

nate and that Lay told him he had approached him in the wrong place, that he should have gone to his office to talk with him. Lay testified he discharged Sexton because of his insubordination in challenging his authority as a manager and making him look little in front of his staff. Lay stated Sexton's discharge was based solely on the conversation that took place between them on May 3.

Sexton had never received any disciplinary warnings during his 7-1/2 years of employment with Respondent. Sexton had, however, been given five driving awards while employed by Respondent.

According to Lay, Sexton's actions on May 3 did not cause any interruption in Respondent's business, nor was Respondent's business adversely affected in any manner by the conversation between them.

C. *Discussion and Analysis*

Counsel for the General Counsel contends the conduct for which Sexton was discharged was protected concerted activity. Counsel for the General Counsel also contends that Sexton's conduct was not so "indefensible" as to cause the mantel of the Act's protection to be taken from him. In this respect, counsel for the General Counsel urges that Sexton's conduct at the May 3 meeting with Transportation Manager Lay was an integral part of his protected concerted activity. Respondent, on the other hand, urges that Sexton was discharged for insubordination in that he challenged the authority of Respondent's manager and made the manager "look little" in front of his staff and other drivers. Respondent also urges that the alleged protected concerted activity involved a "non-issue" in that the bidding matter had already been resolved before Sexton spoke with Transportation Manager Lay on May 3. Respondent further contends Sexton had been made aware of the fact that a resolution of the bidding matter had been made prior to his meeting with Lay on May 3. Finally, Respondent contends Sexton persisted in his refusal to bid after Lay had given him "a clear order to bid."

I shall first address the issue of whether Sexton was engaged in concerted activity protected by the Act. Section 7 of the Act guarantees employees certain rights among which is the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." I am fully persuaded that Sexton was engaged in concerted activity protected by the Act when he met on May 3 with Transportation Manager Lay to discuss bidding on driving assignments. Sexton was a member of the drivers' committee at Respondent. The committee's purpose in part was to discuss working conditions and driver complaints with management. Sexton met with Transportation Manager Lay on May 3, at the request of a fellow driver regarding a working condition, namely, bidding on driving assignments. Not only was Sexton speaking on behalf of employee Martin at his meeting with Lay, but the subject matter discussed concerned all drivers. It is clear Sexton was engaged in protected concerted activity at the time he met with Lay on May 3.

I reject Respondent's contention that the concerted activity matter was a "non-issue" because it had been resolved before Sexton met with Lay on May 3. There is no clear showing on this record that Blunt told Sexton or that Sexton had any knowledge of any resolution of the bidding situation prior to his meeting with Lay even assuming a resolution had been reached.[20] Further, it is clear that it was very much a real issue at least to Sexton and others because, as Distribution Center Manager Stallings testified, he ordered that the bids be placed in a hold status and not implemented "until *I got that resolved*, because *I didn't need* a group of disgruntled employees going and calling on customers." [Emphasis added.] There is no indication on this record that Stallings had resolved the matter by the time Sexton had his meeting with Lay on May 3. Accordingly, I find that the "non-issue" argument of Respondent must fail.

Although I find that Sexton was engaged in concerted activity protected by the Act in his meeting with Transportation Manager Lay on May 3, such a finding does not entirely dispose of the instant case because the Board has consistently held that even an employee who is engaged in protected activity can by opprobrious conduct lose the Act's protection. See *Woodruff & Sons, Inc.*, 265 NLRB 345, 347 (1983). Was Sexton's loud, angry, and annoyed comment to Lay for Lay to repeat his statement that he would fire him opprobrious or extreme enough to remove the protection of the Act from him and allow Respondent to lawfully discharge him? The Board restated in *Woodruff*, supra, its long-held position that "an employee's right to engage in protected activity permits some leeway for impulsive behavior"; however, the Board noted "this must be balanced against the employer's right to maintain order and respect." 265 NLRB at 347. The decision as to whether Sexton crossed that line from acceptable to unacceptable behavior during his meeting with Lay on May 3 depends on several factors. Certain of those factors are: (1) where the discussion took place; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by unfair labor practices of the employer. See, for example, *Atantic Steel Co.*, 245 NLRB 814 (1979). Applying the above guidelines to the instant case, it is readily apparent that the subject matter being discussed by Sexton and Transportation Manager Lay was a matter of concern to all employees and I find Sexton's request for Lay to repeat his statement was part of the res gestae of Sexton's protected discussion. Cf. *Postal Service*, 250 NLRB 4 (1980). With respect to the location of the meeting, it is clear that it was a practice of Respondent, and particularly of Transportation Manager Lay, to meet with employees to discuss work-related concerns anywhere at Respondent. Therefore, there was nothing out of the ordinary with Sexton's speaking

[20] Blunt testified "he would imagine" he and Sexton discussed bidding after he Blunt met with Lay but before Sexton met with Lay because "we were always talking about them [bidding]." I do not find such imagined discussions to establish that Sexton had knowledge of any resolution of the bidding situation.

to Lay at or near the dispatch office where Sexton located Lay. Although Sexton's comment to Lay was not in response to an unfair labor practice, I nonetheless find Sexton did not lose the protection of the Act when he made his comment to Lay. Sexton used no scurrilous language nor was his conduct grossly wrong or vicious. At best, it may have been poor judgment on Sexton's part to ask Transportation Manager Lay to repeat his statement that he would fire him if he did not bid when it came his time; however, the actions of Sexton did not, in my opinion, place him outside the protection of the Act. In arriving at this conclusion, I have considered the fact that Respondent's business was in no way interrupted by Sexton's statement nor did Sexton refuse in any final manner to bid when his assigned time came to bid. Sexton merely stated he was not going to bid until the matter had been worked out with Distribution Center Manager Stallings. Sexton was not due to bid for at least 4 days to 3 weeks from the time he had his conversation with Lay which resulted in his discharge. I am fully persuaded that a balancing of the employer-employee interest in the instant case dictates that Sexton be afforded the protection of the Act.

As outlined above, I am fully persuaded that counsel for the General Counsel established a prima facie showing sufficient to support an inference that Sexton's protected conduct was a "motivating factor" in Respondent's decision to discharge him. I am also persuaded that Respondent failed to demonstrate that the disciplinary action it took against Sexton would have been taken in the absence of his protected conduct. Transportation Manager Lay testified Respondent had never disciplined any employee solely for having a conversation with a supervisor where it regarded the conversation to be an act of insubordination.[21] I am persuaded Respondent discharged Sexton to make an example of him in order to intimidate and silence other members of the drivers' committee and to bring the committee it had created under its absolute control.

The evidence establishes, and I find, that Respondent violated Section 8(a)(1) of the Act when it discharged Sexton on May 4.

One of the Board's most recent decisions regarding issues similar to the instant case is *Postal Service*, 268 NLRB 274 1983), where it reversed an administrative law judge's finding of a violation and dismissed the complaint. In doing so, the Board found that the employee in question in that case had engaged in insubordination resulting in a loss for him of the Act's protection. In that case, the employee became loud and argumentative and told his supervisor he was ignorant and belligerent. The conversation came about as a result of the employee wishing to discuss a correction he desired on his timecard, and when the correction was not made the employee, who also was a union steward, said he would file grievances in the future every time there was a complaint regarding timecards by any employee. The Board found that a prima facie case of unlawful motivation had been established but also determined that the respondent had demonstrated that it would have disciplined the employee in that case even in the absence of his protected conduct. The *Postal* case is factually distinguishable from the case at bar. In the *Postal* case not only was the employee loud, but unlike the instant case, he made personal insults to his supervisor. The employee's action in the *Postal* case also resulted in cessation of normal operations; whereas, in the instant case there was no interruption of any kind of Respondent's business. The employee in the *Postal* case had also been disciplined five times in 2 years for conduct akin to that shown in *Postal* . In the instant case, Sexton had no prior warnings but rather had an acceptable driving record recognized by five driving awards.

Pilot Freight Carriers, 265 NLRB 129 (1982), and *Benjamin Electrical Engineering*, 264 NLRB 1061 (1982), relied on by Respondent in support of its contention that the instant case should be dismissed are distinguishable. In *Pilot Freight*, supra, certain employees got together and complained on at least two occasions to management regarding management's selection of a certain individual for a position vacancy. The protesting employees felt the person chosen by management for the position was unqualified. One of those in the protest group was an employee named Kirby. Kirby was discharged as a result of her conduct at a meeting that took place approximately 4 weeks after the last protest meeting she and her fellow employees had with management about the position vacancy. The Board adopted the administrative law judge's decision that Kirby was discharged because of her insubordinate conduct at that latter meeting. The administrative law judge found Kirby was not only hostile and argumentative, but that she was haughty, uncooperative, and disrespectful at that latter meeting. The administrative law judge concluded there was no connection between Kirby's earlier concerted activities and her latter discharge for insubordination. The administrative law judge noted that Kirby was not, nor was she perceived to be, the leader or spokesperson for the protesting group at the earlier meetings. In the instant case, Sexton was one of five specifically elected employees to represent other employees with management. The administrative law judge also found, unlike the instant case, that each person spoke for himself at the protest meetings. Kirby was discharged for her conduct at her latter meeting with management where she was the only employee present and at which she refused to make a commitment to management to try to improve her attendance, which was less than acceptable, and to try to improve working conditions. Kirby at that latter meeting responded to questions of management relating to attendance, morale, production, and attitude by stating "no comment" or "not guilty." The administrative law judge found Kirby was dicharged for conduct related to her alone and that she was not acting or speaking for others at the time of the events that resulted in her discharge. In *Benjamin Electrical*, supra, an employee, Lopez, was discharged solely for his insubordinate manner of complaining rather than the content of his complaint. In that case, unlike the

[21] Respondent had discharged an employee prior to Lay's becoming transportation manager for insubordination to customers and supervisors, and for driving at excessive speeds and tampering with the tachograph on his truck, but had not discharged any employee solely for insubordination.

instant case, Lopez repeatedly interrupted his work to register complaints and, in doing so, he would leave his 22d floor job assignment and go to the ground level to call the union without permission and contrary to management's instructions. It is clear that Sexton's manner of complaining—asking Lay to repeat his statement that he would fire him if he did not bid when it came his time to bid—is in no way comparable to the manner of complaining reflected in *Benjamin Electrical.*

CONCLUSIONS OF LAW

1. Martin Brower Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act when on or about May 4, 1983, it discharged and thereafter failed and refused to reinstate its employee John V. Sexton for engaging in protected concerted activity.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the purposes of the Act.

It having been found that Respondent in violation of Section 8(a)(1) of the Act unlawfully terminated the employment of John V. Sexton, I shall recommend that Respondent be ordered to offer him full reinstatement to his former or substantial equivalent position of employment without prejudice to his seniority or other rights, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950); interest shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, it is recommended that Respondent expunge from its files any reference to the May 4 discharge of Sexton, and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982). It is recommended that Respondent post the attached notice.

On the foregoing findings of fact, conclusions of law, and the entire record, I issue the following recommended[22]

ORDER

The Respondent, Martin Brower Company, Kissimmee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in protected concerted activity by complaining to Respondent about a proposed change in Respondent's bidding procedures, or for other mutual aid and protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer John V. Sexton immediate and full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files any reference to the May 4, 1983 discharge of employee John V. Sexton, and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Kissimmee, Florida, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial in which all parties had the opportunity to present their evidence, it has been decided that we violated the law in certain ways. We have been ordered to post this notice.

The National Labor Relations Act gives you, as employees, certain rights.

To engage in self-organization
To form, join, or help a union
To bargain collectively through representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things.

WE WILL NOT discharge our employees or otherwise discriminate against them because they engaged in protected concerted activity by complaining about a proposed change in our bidding procedures or for other mutual aid and protection.

WE WILL offer John V. Sexton immediate and full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights, and WE WILL make him whole for any loss of pay he may have suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the May 4, 1983 discharge of John V. Sexton, and WE WILL notify him that this has been done, and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

MARTIN BROWER COMPANY